$300,000, approximately the total referred to in the Commission's order terminating the United proceedings.

Without holding any hearing, the Commission on January 23, 1959, rejected this proposal. Instead, it ordered Mississippi to file a reduced rate effective not just for the period ending April 1, 1956, but extending to November 1, 1958, when a separate rate increase of Mississippi had become effective (R. 164-176). The effect of the Commission's order was to require Mississippi to refund approximately $2,000,000 (with interest at 6%) more than the $300,000 attributable to benefits realized by Mississippi from United.

Mississippi petitioned for rehearing (R. 191-196), pointing out, *inter alia*, that the January 23, 1959 order had been issued "without hearing and without giving Mississippi notice and opportunity to be heard" (R. 196). The Commission, on March 5, 1959, granted rehearing (R. 199-200); however, on April 2, 1959, the Commission, still without notice or hearing, reaffirmed the January 23 order (R. 200-209).

The Court of Appeals affirmed the Commission's order and ruled that the 1953 settlement order had "built into Mississippi's . . . rate *an automatic downward revision*, the amount of which was dependent upon a future event; i.e., the Commission's final order terminating" the United rate case (italics in original) (App. A., *infra*, p. 9a). The court held that "Undoubtedly the Commission can promulgate a rate subject to automatic retroactive revision dependent upon a future event" (App. A., *infra*, pp. 9a-10a). Accordingly, the court reasoned, Mississippi's settlement rate had been automatically reduced as of November 8, 1955, to reflect the United rate reduction.

While expressly recognizing that the benefits of the United rate reduction had lasted only to April 1, 1956 (App. A., *infra*, p. 6a), the court, nevertheless, went on to hold that Mississippi's reduced rate had continued in effect until November 1, 1958, because "[n]o further upward revision of that rate could be had except by proceedings under Secs. 4(d), (e) of the Natural Gas Act and the accompanying Regulations" (App. A., *infra*, p. 10a), and Mississippi had not undertaken to change this rate prior to its subsequent rate filing which became effective November 1, 1958 (App. A., *infra*, pp. 3a, 10a-12a). Finally, the court held that Mississippi was not entitled to a hearing on the January 23, 1959, order because the issue as to the meaning of the settlement agreement between Mississippi and its utility customers "was clearly and fully stated and no questions of fact were presented" (App. A., *infra*, p. 14a).

REASONS FOR GRANTING THE WRIT

1. Review of the decision below is warranted because the Court of Appeals has drastically departed from traditional concepts of rate regulation in rate settlement proceedings. Rate settlement agreements have assumed a dominant importance under the Natural Gas Act. The annual dollar volume of pipeline rate increases now being collected subject to refund already exceeds 335 million dollars.[4] In order to expedite disposition of the heavy volume of rate increases pending before it, the Commission has always encouraged settlement of pipeline rate proceedings. During the past ten years,

[4] 36th Annual Report of the Federal Power Commission (1959) at p. 78. The actual amount collected by pipelines subject to refund greatly exceeds this figure; many pipeline rate increases have been effective subject to refund for periods substantially longer than one year.

approximately sixty cases, constituting about two-thirds of the total pipeline rate cases disposed of by the Commission, have been terminated on the basis of negotiated settlement agreements.[5] Since the cost of purchased gas is a substantial element in a pipeline's cost of service, most pipeline rate settlements with their utility customers fix rates which, as here, are subject to reduction if the gas supplier's rates to the pipeline are in turn reduced in proceedings simultaneously pending. Indeed, in most instances, pipeline settlements are possible only on such terms because there are literally hundreds of producer proceedings pending before the Commission in which proposed increases are being collected subject to refund.[6] Not only this vast number, but also the delay in disposition of such producer cases, require pipeline settlements on this basis. Despite the lapse of six years since producers were held

[5] The Commission in its 1959 Annual Report expressly noted (at p. 79):

> During the fiscal year several rate cases were settled by agreement of all parties, but conditioned with respect to gas purchased from other companies whose rates were also under investigation. In cases of this type the settlements have been conditioned on the purchasing company passing on to its customers any refunds it may ultimately receive from the supplying company.

A list of cases involving orders approving settlements and some typical future refund and rate revision provisions are set forth in Appendix C, *infra*, pp. 19a-28a. It will be noted that future refund and rate revision provisions have also been conditioned on the ultimate determination of other cost of service factors such as Federal income taxes, state recovery taxes in litigation, and state minimum price orders in litigation.

[6] As of the end of the fiscal year 1959, there were 1,689 producer rate increases effective subject to refund, involving 111 million dollars of increased rates. See the 36th Annual Report of the Federal Power Commission (1959) at p. 77.

subject to regulation under the Natural Gas Act by this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), acceptable principles for regulating producer rates have not as yet been established.

The intent of the 1953 settlement involved here, like the scores of other settlements couched in similar language,[7] was to pass on to its utility customers whatever reductions in cost of gas Mississippi might receive from United by the final order of the Commission in United's pending rate proceedings. The settlement agreement expressly stated that the pass on was to be "* * * attributable to reduced costs of gas purchased by Mississippi from United * * *" (R. 101), and "the proper amount * * * of any such rate reduction ordered and made effective by the Commission in respect of United rates * * *" (R. 101). The procedure set out in the agreement for determining this amount was to be varied in specified circumstances to the extent necessary "* * * to carry out the *purpose* of having Mississippi pass on to its utility customers *only* the proper proportion of any such over-all reduction of United's rates" (R. 101). Yet despite the fact that under the United rate reduction, Mississippi received benefits of only some $300,000 for the period ending April 1, 1956, the Commission's order here under review, nevertheless, requires Mississippi to pass on to its utility customers an additional $2,000,000 based on a retroactive rate reduction for a much longer period extending to November 1, 1958.

It is thus apparent that the decision of the court below not only has substantial impact upon settlements

[7] See Appendix C, *infra*, pp. 21a-28a.

already reached but also imposes formidable problems in the way of future settlements, thereby impairing substantially the use of this route for easing the Commission's extremely heavy administrative backlog. Cf. *Phillips Petroleum Company*, FPC Opinion No. 338, issued September 28, 1950, mimeo. p. 9. As a matter of fact, the decision will aggravate the already chaotic condition in the gas industry resulting from numerous undecided rate cases. The effect of the court's ruling that natural gas companies having this type of rate settlement must make protective rate filings whenever their supplier files new rate increases is to compel additional rate cases which might otherwise not be filed.

2. Apparently recognizing the Commission's lack of authority to establish rates retroactively (*F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944), *Hope Natural Gas Co.* v. *F.P.C.*, 196 F. 2d 803, 805 (C.A. 4, 1952)), the court below rationalized the Commission's order requiring Mississippi to reduce its rate for a past period on the theory that the Commission's order of June 3, 1953, contained a built-in automatic downward revision of rates (App. A., *infra*, pp. 9a-10a).

The provision of the settlement agreement for a rate reduction "unless otherwise ordered by the Commission" (R. 101) and the fact that the Commission's order required a new rate filing are clearly at odds with the court's notion that Mississippi's rate was to be reduced *automatically* upon a reduction in the United rates. Moreover, the theory of the court below of "an automatic downward revision" of rates is in conflict with the numerous decisions under the Act which hold that rates are not subject to automatic revision but can be changed only by complying with the

filing and notice provisions of Section 4(d) of the Natural Gas Act. See, e.g., *Episcopal Theological Seminary* v. *F.P.C.*, 269 F. 2d 228 (C.A.D.C., 1959), *cert. denied*, 361 U.S. 895 (1959); *Bel Oil Corp.* v. *F.P.C.*, 255 F. 2d 548 (C.A. 5, 1958), *cert. denied*, 358 U.S. 804 (1958) and companion cases; *Cities Service Gas Producing Co.* v. *F.P.C.*, 233 F. 2d 726 (C.A. 10, 1955), *cert. denied*, 350 U.S. 911 (1956); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C.A. 5, 1947), *cert. denied*, 332 U.S. 770 (1947); *Mississippi River Fuel Corp.* v. *F.P.C.*, 121 F. 2d 159 (C.A. 8, 1941).

Under these decisions a natural gas company may not change the rate currently in effect without an appropriate filing under Section 4(d), even though the purchaser agreed to the rate change as part of the original contract and the contract itself had long since been filed with the Commission as the Company's rate schedule. In the *Episcopal Theological Seminary* case, the court below, in rejecting an argument that such contractually agreed-upon rate changes become effective automatically without any necessity of additional filings with the Commission, explained the basis for the rule as follows (269 F. 2d at 233):

> Section 4(d) * * * requires that the public must be kept informed of the "changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." No change may be made in a "rate" or "schedule then in force" without notice to the Commission and the public. This language is persuasive that forehanded contractual provisions cannot modify the regulatory provisions of the Act as urged by petitioners. The purpose is to advise the public of a change in the current rate.

The unanimity of authority against automatic rate changes is emphasized by the fact that none of the cases relied on by the court below (App. A., *infra*, p. 10a) sanction automatic rate revisions. These cases typically involve a determination of a producer's effective rate for natural gas as of June 7, 1954, the date on which the Commission had undertaken to initiate regulation of such producers pursuant to *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). Since the producer's rate was determined by its contract, it was necessary to determine the operative effect prior to June 7, 1954, of price escalation provisions of the contract in order to ascertain the effective rate on that date. These cases determined the effect of the escalation provisions only for the unregulated period prior to June 7, 1954, a period during which the requirements of Section 4(d) did not apply. Indeed, the very decisions relied upon sharply distinguish between rate changes before and after June 7, 1954.

3. While recognizing that the benefits of the United rate reduction had terminated on April 1, 1956, with the effectiveness of United's new rate increase, (App. A., *infra*, p. 6a) the court below nevertheless ruled that the 1953 settlement agreement required a Mississippi rate reduction far beyond April 1, 1956 because Mississippi had not filed a new rate concurrently with the United rate increase (App. A., *infra*, p. 10a). In so holding, the court acted as if it were dealing with rates for the future and hence subject to the requirements of Section 4(d) of the Act relative to prospective rates.

The fact is, however, that while the settlement talked in terms of a prospective reduction, the lapse of time made a prospective reduction impossible, the period

involved being entirely in the past. Consequently, Mississippi's obligation was to make a refund, not to file a reduced rate for a past period on the fiction that it could operate prospectively.[9]

Had the court treated the matter as the refund problem it is,[10] it would have avoided the incongruities of applying the prospective provisions of Section 4(d) and 4(e) of the Natural Gas Act to a past period, and also would have recognized that no rate filing was required of Mississippi by the 1953 settlement agreement in order to discharge its settlement obligation.

The court's failure to recognize that it was dealing with a refund case rather than a prospective rate filing forced it into the more serious error of refusing to give effect to the fact that on April 1, 1956, a new United rate increase had become effective which terminated the benefits Mississippi received under the previous United rate reduction. In thus ignoring the realities of the situation, the court reached a decision which is in conflict with *Mississippi River Fuel Corporation* v. *F.P.C.*,

[9] Paragraph VI of the 1953 settlement agreement clearly envisaged the making of refunds, rather than the filing of new rates, for past periods.

[10] The court, in fact, treated the matter as a refund problem in imposing interest, and there is no reason for inconsistently treating the main problem. See App. A, *infra*, p. 13a.

[11] In ruling that Mississippi should have filed a new rate concurrently with the effectiveness of United's rate increase on April 1, 1956, the court below overlooked the fact that on that date Mississippi's effective rate on file with the Commission was the settlement rate, not a reduced rate reflecting the United reduction. The court's ruling thus achieves the incongruous result of holding that Mississippi should have made a new filing in order to retain an already effective rate.

202 F. 2d 899 (C.A. 3, 1953).[11] In that case Mississippi had filed a new rate schedule on April 30, 1952, to be effective June 1, 1952, but the Federal Power Commission summarily rejected the filing. In setting aside the Commission's action, the Third Circuit directed the Commission to permit Mississippi to refile the rate schedule and to make it effective immediately (without the usual five-month suspension) upon Mississippi's filing of an appropriate motion with the Commission. Since the court's opinion so directing was not issued until February, 1953, almost a year after Mississippi's original filing on April 30, 1952, Mississippi urged in a petition for rehearing that Mississippi should not be penalized because of the unlawful action of the Commission and that the rejected filing should be made effective as of June 1, 1952, as would have been the case had the Commission accepted the filing. Laclede Gas Company, Mississippi's largest utility customer, complained that such action would force it to pay about $3,000,000 in additional charges for gas already resold to its customers on the basis of Mississippi's existing rate. The court held that it could not ignore Laclede's plight and stated (202 F. 2d at 904):

> Such history cannot be changed and in our judgment should not be ignored. It is neither realistic nor proper to treat an affirmative though legally misconceived rejection of plaintiff's proposed rate increase by the administrative body which had jurisdiction over the subject matter either as a tacit approval or as something that never happened.

[11] This Third Circuit case involves the very Mississippi rate filing which resulted in the settlement agreement here involved.

Thus, the Third Circuit held that when retrospective regulation under the Natural Gas Act is involved, it is neither "realistic nor proper" to ignore facts occurring in the past and thereby reach an inequitable result. Similarly here, it is neither "realistic nor proper" to ignore what has occurred since the original 1953 settlement agreement—namely, the April 1, 1956, United rate increase. Yet the court below has done precisely that. It has required Mississippi unjustly to enrich its utility customers,[12] including Laclede, by over $2,000,000 in spite of the fact that the April 1, 1956, United rate increase limited Mississippi's benefits under the previous United rate reduction to around $300,000. To say, as the court below did, that Mississippi could have protected itself by filing a new rate contemporaneous with the April 1, 1956, United filing is a bootstrapping and unrealistic argument which the Third Circuit implicitly rejected. "Although Laclede in the Third Circuit case could have protected itself by filing a new rate contemporaneous with the Mississippi rate filing of April 30, 1952, the Court of Appeals refused so to reconstruct history as to place such an unrealistic burden on Laclede."[13] The contrary position and re-

[12] The utilities have never indicated that they have any intention or obligation to pass this gratuity on to their customers. Since Mississippi did not increase its settlement rate when United increased its rate April 1, 1956, there was no Mississippi rate increase to be passed on by the utilities to their customers at that time subject to a refund obligation to them. Thus the lack of a Mississippi filing by which the court below says Mississippi could have protected itself protects the utilities from such a refund obligation to their customers.

[13] Laclede is the same customer which would receive the bulk of the windfall involved in the instant case.

sult reached by the court here conflicts with the Third Circuit decision.

4. Finally, the court below erred in affirming the Commission's denial to Mississippi of a hearing prior to the issuance of its January, 1959, order. The court ruled that the only question involved was an "interpretation" of the settlement agreement and that, therefore, there was "no need for an evidentiary hearing". It is well-settled law, however, that the interpretation of a contract is not exclusively a question of law; it is "to some extent at least, a question of fact depending on the nature of the business to which the contract relates, the ordinary usage there, *the circumstances under which the parties dealt* and perhaps upon other surrounding facts". *Roig* v. *Electrical Research Products*, 57 F. 2d 639 (C.A. 1, 1932). Here the intention of the parties as to the meaning of the settlement agreement is a basic issue on which there was sharp controversy between the parties. By the time the settlement came up for interpretation, the parties were faced with applying to a past period language plainly designed for future application but which could not be so applied. Had Mississippi been permitted to submit evidence on the various matters relevant thereto, it could have demonstrated the soundness of its interpretation of the settlement agreement.

Moreover, a hearing was particularly appropriate in view of the provision in the agreement that the refund benefits received by Mississippi were to be passed on by it to its utility customers "unless otherwise ordered by the Commission" (R. 100, 101). Underlying this provision was the recognition by the Commission and the parties that circumstances might thereafter

arise which would call for Commission action regardless of the terms of the agreement. Since the fundamental intention of the settlement agreement was to require Mississippi to pass on to its utility customers only the benefits it received from a United rate reduction, and since that rate reduction was terminated by the United rate increase of April 1, 1956, the Commission had the duty to "otherwise order" even assuming, *arguendo*, that literally the settlement agreement required Mississippi to pass on benefits in excess of the amount of benefits it received from United. At the very least, Mississippi was entitled to a hearing so that it could show that the Commission should "otherwise order" because a refund for the period from November 8, 1955, to November 1, 1958, instead of for the period from November 8, 1955, to April 1, 1956, bestowed upon Mississippi's utility customers, at Mississippi's expense, an unwarranted windfall of approximately $2,000,000 plus interest. The decision below that Mississippi was not entitled to such a hearing is erroneous and, in fact, so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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December, 1960

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15167

MISSISSIPPI RIVER FUEL CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY, MIDSOUTH GAS COMPANY, *Intervenors*

On Petition to Review an Order
of the Federal Power Commission

Decided June 30, 1960

Before PRETTYMAN, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: This is an appeal by Mississippi River Fuel Corp. (Mississippi), a natural gas pipeline company, from an order of the Federal Power Commission (Commission) directing Mississippi to make certain rate reductions, and pay certain refunds, to the intervenors, Illinois Power Co., Laclede Gas Co., and MidSouth Gas Co.

The controversy arises out of Mississippi's position as middleman in the sale of gas. Mississippi purchases gas from United Gas Pipe Line Co. (United) and in turn sells gas to utility customers, among them the intervenors. It is obvious, of course, that the cost of gas supplied by United to Mississippi has a direct impact on the price of that gas to the intervenors. The present problem emerges from the fact that Mississippi was engaged in rate disputes during approximately the same period both as to the cost of its gas from United, and as to the price which it sought to charge intervenors on resale. These proceed-

ings were carried on independently. A narration of their history is necessary.

Mississippi v. Intervenors

During the years 1951 and 1952 Mississippi filed two proposed rate increases for gas sold to intervenors.[1] Both increases were eventually disallowed by the Commission.[2] However, disallowance of the second increase, which envisioned a tariff of $2.00/mcf demand and .18/mcf commodity charge, was reversed by the Third Circuit,[3] and the cause remanded. Mississippi was permitted to move that the increase be made effective at once, subject to refund, and subject also to the Commission's right to hold hearings on the new schedule.

Mississippi then requested a settlement conference and a settlement was ultimately negotiated (Mississippi-Intervenor settlement) which set an applicable rate, effective April 10, 1953, of $1.80 demand and a .17 commodity charge.[4] (Schedule F-1). One of the difficulties met in gaining this agreement was that Mississippi was even then embroiled in a rate dispute with United, its principal supplier. United was seeking a higher rate schedule (Dockets

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[1] The first increase was sought February 28, 1951, requesting a rate of $1.60/mcf demand and .15/mcf commodity charge. Docket No. G-1641. This was put into effect subject to refund. The Commission later rejected this rate, and reinstated the previous schedule. Matter of Mississippi River Fuel Corp., 11 F.P.C. 288 (Aug. 4, 1952). The second increase was sought April 30, 1952. Docket No. G-2153.

[2] Matter of Mississippi River Fuel Corp., 11 F. P. C. 288 (Aug. 4, 1952) (first increase); Commission order, Docket No. G-2153, 11 F.P.C. 1029 (May 29, 1952) (second increase).

[3] Mississippi River Fuel Corp. v. Federal Power Commission, 202 F. 2d 899, *cert. denied*, 345 U.S. 988 (1953).

[4] Matter of Mississippi River Fuel Corp., 12 F.P.C. 151 (June 3, 1953).

G-2019 and G-1142) for gas sold to Mississippi and, in fact, the higher rates were being collected subject to refund. Since the possibility existed that this higher tariff might be reduced after the extensive hearings being held in those dockets, two provisions were inserted in the Mississippi-Intervenor settlement decree which in substance provided:

(a) If United was required by the Commission in Docket G-2019 to refund to Mississippi any part of the charges then being paid to United by Mississippi, Mississippi would refund to its utility customers that portion of the refund attributable to gas purchased from United by Mississippi and resold to Mississippi's customers. (Paragraph VI).[5]

(b) If United was required to reduce its rates charged to Mississippi as a result of the proceedings in Dockets G-2019 and G-1142, Mississippi would then file proportionately reduced schedule F-1 rates so as to pass the proper amount of United's reduction onto the intervenors. (Paragraph VII).[6]

This settlement was approved by the Commission on June 3, 1953,[7] and from April 10, 1953, onward Mississippi charged intervenors on the basis of the F-1 schedule. No increase in that rate was sought by Mississippi until May 1, 1958, which increase went into effect on November 1, 1958. (Docket No. G-15174).

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[5] "If United Gas Pipe Line Company is required by any final order of the Commission which is accepted by United or becomes final in any court review or otherwise, in the proceedings in Commission docket No. G-2019 to refund to Mississippi any part of the charges now being collected under bond, such portion, if any, of such refund attributable to natural gas purchased from United by Mississippi after 7 a.m. on April 10, 1953 . . . and resold to the utility customers of Mississippi, unless otherwise ordered by the Commission, shall be refunded to such utility customers. . . ." 12 F.P.C. at 154-55.

[6] See text, *infra*.

[7] 12 F.P.C. 151.

The Dockets mentioned in the Mississippi-Intervenor settlement evolved out of disputes between United and Mississippi regarding the propriety of United's gas charges. Docket G-1142 was an investigation of United's rate schedule begun by the Commission in 1948. One of the rates there under scrutiny was Schedule PL-2, which called for payment by Mississippi of $1.30/mcf demand charge per month and .12½/mcf commodity charge. In addition, due to peculiarities not here pertinent, Mississippi was also being billed for a portion of the United gas it received under another schedule, PL-3. This rate was the result of a filing made by United in Docket G-2019 seeking a tariff of .65/mcf demand and .09/mcf commodity charge.[8] Though hearings regarding the propriety of both the PL-2 and PL-3 rates were in progress, both rates were in force at the time the Mississippi-Intervenor settlement was being negotiated. It was the possibility of their reduction that led to the inclusion in that settlement of the provisions whereby reduction in United's PL-2 and PL-3 rates would obligate Mississippi to reduce its own F-1 Schedule to the intervenors.

The hearings regarding rates PL-2 and PL-3 culminated in a Commission order of November 8, 1955, which (1) replaced the two United-Mississippi rates with one uniform tariff; and (2) ordered this uniform tariff to be .75/mcf demand and .10/mcf commodity charge.[9] (Schedule PL-C). Though this rate represented a substantial reduction of the old PL-2 rate, Mississippi nevertheless petitioned this court

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[8] The PL-3 rate had gone into effect, subject to refund, on January 3, 1953. See Commission Order, Docket No. G-2019, 12 F.P.C. 1162 (Aug. 1, 1952).

[9] Matter of United Gas Pipe Line Co., 14 F.P.C. 353, 406 (July 21, 1955).

for review.[10] We vacated the November 8 order, and remanded the cause to the Commission.[11]

During the subsequent proceedings a settlement was finally reached between United and Mississippi in which Mississippi agreed to accept the PL-C rate as embodied in the Commission's November 8 order. That rate retroactively replaced United's PL-2 and PL-3 rates as of November 8, 1955, and Dockets G-1142 and G-2019 were finally terminated by the Commission's United-Mississippi settlement order of September 11, 1958.[12]

The Present Controversy

The retroactive tariff reduction embodied in Mississippi's acceptance of schedule PL-C (.75 mcf and .10 mcf) meant that United was obligated to refund certain amounts to Mississippi, those amounts being the difference between the PL-C rate and the charges collected under the superseded PL-2 and PL-3 rates after the effective date of the PL-C schedule, (November 8, 1955). Similarly, the termination of Dockets G-1142 and G-2019 triggered Mississippi's obligation under the Mississippi-Intervenor settlement to reduce its F-1 schedule and credit Intervenors with the proper proportion of that reduction.

Here, however, the time factor becomes highly important. Though the United-Mississippi accord did not become final until September 11, 1958, the PL-C charges

[10] The PL-2 rate had been $1.30 demand and 12½ commodity charge. Thus, though the PL-C settlement rate (.75 demand and .10 commodity) benefited Mississippi as to the PL-2 rate, it was higher than the PL-3 rate (.65 demand and .09 commodity) involved on Docket G-2019.

[11] Mississippi River Fuel Corp. v. Federal Power Commission, 102 U.S. App. D.C. 238, 252 F. 2d 619, *cert. denied*, 355 U.S. 904 (1957).

[12] United Gas Pipe Line Co., Docket Nos. G-1142 and G-2019, 20 F.P.C. 349.

therein adopted were made retroactive to November 8, 1955. In the interval between the retroactive date of the PL-C schedule vis-a-vis United and Mississippi (November 8, 1955), and the date upon which that schedule was actually promulgated (September 11, 1958), United had already moved for another increase as against Mississippi which would bring its charges above the superseded PL-2 and PL-3 rates, thus ending whatever benefits Mississippi gained by virtue of the United-Mississippi settlement. This new rate went into effect, subject to refund, on April 1, 1956 (Docket G-9547) and the Commission has not yet passed on its propriety. Thus, the only period in which the United-Mississippi PL-C rate was actually operative was the months between the effective date of that rate (November 8, 1955) and the date upon which the new United rate in Docket G-9547 went into effect (April 1, 1956). We have, then, this question: Is Mississippi obligated to reduce its tariff to intervenors, and refund the proper amounts under that reduced schedule, *only* from the period November 8, 1955 to March 31, 1956? Or is it obligated to reduce that tariff, and make the full refunds under it, from the period November 8, 1955 to November 1, 1958, the date when the Commission allowed Mississippi provisionally to increase its charges to intervenors pursuant to Mississippi's request?

Contentions of the Parties

Shortly after the Commission's settlement order promulgating the United-Mississippi PL-C rate, Mississippi notified the Commission by letter of its intention to comply with the terms of the Mississippi-Intervenor settlement by making the necessary refunds. It agreed to refund to intervenors the total of $105,750.98, which represents the proper amount due them for the period November 8, 1955 through December 31, 1955. This amount is not in dispute. Similarly, it proposed to reduce its F-1 schedule to Intervenors for the closed end period January 1, 1956 through

March 31, 1956, and make the resulting refund for that period. However, it maintained that under the Mississippi-Intervenor settlement it was not obligated to reduce the F-1 schedule beyond April 1, 1956 since from that time forward it was obliged to pay the rate increase granted United in Docket G-9547. This appeal turns on whether Mississippi's contention is correct on this critical point.

The intervenors responded to this proposal, arguing to the Commission that Mississippi could not limit its rate reduction solely to the period November 8, 1955 through March 31, 1956. They contend that the Mississippi-Intervenor agreement obligates Mississippi to reduce its F-1 schedule in accordance with the United-Mississippi settlement rate, *regardless of whether United is subsequently allowed a provisional rate increase.* In short, the intervenors contend that unless and until Mississippi gains a rate increase as against them by the regular procedures prescribed by the Natural Gas Act,[13] it cannot indirectly effect a rate increase by refusing to lower the F-1 schedule as it expressly agreed to do in the Mississippi-Intervenor settlement.

Action of The Commission

On January 23, 1959 the Commission issued the order here under review approving the Mississippi refund of $105,750.98 for the period November 8, 1955 through December 31, 1955, but refusing Mississippi permission to limit the effectiveness of its F-1 schedule reduction to the

[13] Section 4(d) of the Act provides that unless otherwise ordered by the Commission, no rate change shall be made by any natural gas company except after 30 day notice to the Commission. Such notice shall be given by filing with the Commission new schedules stating the changes to be made. 52 Stat. 823 (1938), 15 U.S.C. § 717c(d) (1958). Section 4(e) of the Act sets out the procedures whereby the Commission may challenge such a filing, and suspend the rate for 5 months pending hearing. 52 Stat. 823 (1938), 15 U.S.C. § 171c(e) (1958).

period January 1, 1956 through March 31, 1956. The Commission reasoned that at the conclusion of the United-Mississippi dispute, Mississippi was required to file new schedule F-1 rates as against the intervenors which were *thereafter to continue in effect* until changed by a "proper rate change proposal under the [Natural Gas] Act." It characterized Mississippi's proposal as "tantamount to a claim that we should permit reduced Rate Schedule F-1 rate [*sic*] to be applicable for a short period, and then to be automatically followed by a return to the $1.80 demand charge and 17 cents commodity charge rate agreed-upon by the parties," and refused to sanction an interpretation of the Mississippi-Intervenor agreement granting what, in effect, would be automatic rate escalation. It ordered Mississippi to reduce the F-1 rate from January 1, 1956 through October 31, 1958 and to make the appropriate refunds at 6% interest.

The Commission, in response to Mississippi's request for rehearing, stayed the effect of its order until April 2, 1959, when it substantially readopted its initial position. Mississippi was denied a further rehearing, and this appeal followed.

The resolution of the issues presented turns upon the interpretation of the Mississippi-Intervenor settlement provisions, since whatever obligation Mississippi has undertaken must be measured by the terms of that settlement. The pertinent paragraph of that settlement (paragraph VII)[14] stated:

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[14] Paragraph VI is inapplicable in the present controversy. That paragraph obligated Mississippi to refund to intervenors any appropriate amounts gained by virtue of a subsequent decrease in the United-Mississippi PL-3 rate in Docket No. G-2019. (.65 demand and .09 commodity). However, the United-Mississippi settlement rate (.75 demand and .10 commodity) was higher than this PL-3 rate. Mississippi gained no refund in Docket G-2019 and thus incurred no obligation under paragraph VI.

"If United Gas Pipe Line Co. is required by any final order or orders of the Commission, which are accepted by United or become final in any court review or otherwise, *in the proceedings in Commission docket Nos. G-1142 and G-2019*, or either of them, to make any reduction in the rates to be charged or collected for natural gas sold by United to Mississippi, then Mississippi, unless otherwise ordered by the Commission, *shall* file with the Commission changes in its rate schedule F-1 to reduce the rates therein provided so as to pass on to its utility customers the proper amount . . . of any such rate reduction ordered and made effective by the Commission in respect of United's rates. The said change in Mississippi's rate schedule F-1 is to be filed within 60 days after the date on which the order reducing United's rates becomes final, *to be effective as of the date as of which the reduction in United's rates is made effective*. [Here follows a formula by which the proper amounts are to be calculated.]

"If, in ordering such rate reduction in United's rates either the demand charge or commodity charge is increased, then the reduction to be made by Mississippi in the demand charge and commodity charge in rate schedule F-1 shall be varied to the extent necessary to carry out the purpose of having Mississippi pass on to its utility customers only the proper proportion of any such overall reduction of United's rates." (Emphasis added). 12 F.P.C. at 155.

It is important to note, at this point, the legal effect of Opinion No. 253 in Docket G-2153, the order which made the Mississippi-Intervenor settlement rate F-1 effective. That opinion and order was the express vehicle which instituted the F-1 rates as between Mississippi and the Intervenors. However, the order specifically built into the F-1 rate *an automatic downward revision*, the amount of which was dependent upon a future event, *i.e.*, the Commission's final order terminating the United-Mississippi dispute in Dockets G-1142 and G-2019. Undoubtedly the Commission can promulgate a rate subject to automatic retroactive re-

vision dependent upon a future event. See *Kerr-McGee Oil Industries, Inc.* v. *Federal Power Commission*, 260 F.2d 602 (10th Cir. 1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 253 F.2d 3 (3d Cir.), *cert. denied*, 357 U.S. 927 (1958). *Cf. Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F.2d 726 (10th Cir.), *cert denied*, 352 U.S. 911 (1956). Yet the *only* contingency upon which the reduction hinged was the one specifically expressed, *i.e.*, United's reduction in its rates to Mississippi as embodied in a final Commission order. Nothing expressly or impliedly made the duration of that rate reduction contingent upon a subsequent *increase* in United's rates to Mississippi sought in a proceeding other than those named.

By tying United's later increase into the F-1 schedule, Mississippi is attempting to inject an automatic escalated revision into that schedule to offset its increased costs incurred due to the April 1, 1956 United rate increase. This it cannot do. No such significant rate change was envisioned by the Mississippi-Intervenor settlement agreement and decree. The Commission put the F-1 rate into effect, along with its automatic decrease, from April 10, 1953. No further upward revision of that rate could be had except by proceedings under Sees. 4(d), (e) of the Natural Gas Act[15] and the accompanying Regulations.[16] If at the time United sought its April 1 increase Mississippi concluded that a corresponding rise in its resale price was necessary, its remedy was to move at that time for a higher rate to the Intervenors. It cannot now read into the Mississippi-Intervenor settlement terms which are not there, *viz.*, provision for an automatic escalation in its resale schedule in the event of a subsequent United rate increase.

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[15] See note 13, *supra*.

[16] 13 F.R. 6373 (1948), 18 C.F.R. § 154.21 (1949).

Mississippi vigorously argues that because it accepted the United settlement rate only for the period November 1, 1955 through March 31, 1956, the limited period for which that rate was actually operative must also be read into the Mississippi-Intervenor settlement. Here, however, petitioner fails to differentiate between the *fact* that the United rate was reduced and the period of *time* for which that reduction was in force. The sole pertinent fact in the United-Mississippi settlement that had relevance to the Mississippi-Intervenor agreement was the fact that a reduction of United's rates to Mississippi was there fixed. Nothing in the Mississippi-Intervenor accord limits the period for which that reduction runs, nor provides for a cessation of Mississippi's obligation to intervenors in the event the United-Mississippi settlement rate is superseded.

The reason for the absence of such a limitation is obvious. At the time the Mississippi-Intervenor settlement was negotiated it was not certain whether any reduction in United's rates would be allowed Mississippi. Nevertheless, if a reduction was ordered, both the intervenors and Mississippi agreed that the intervenors would receive a refund covering the excess charge. However, it does not follow that because the intervenors provided for a reduction in their rates, they also agreed to an automatic self-executing escalation of those rates in the event Mississippi was subjected to a subsequent United rate increase. The Mississippi-Intervenor settlement is not cast in the terms of the familiar escalator clause common in this industry. See, e.g., *Cities Service Gas Producing Co.* v. *Federal Power Commission*, *supra*; *Phillips Petroleum Co.* v. *Federal Power Commission*, *supra*; *Kerr-McGee Oil Industries, Inc.* v. *Federal Power Commission*, *supra*. To accept petitioner's interpretation of the Mississippi-Intervenor settlement would be to assert that the intervenors agreed (1) to an automatic increase in its rates immediately upon a subsequent United rate increase; (2) to allow the *amount* of that raise to be dictated by agreement between United and

Mississippi, and (3) to surrender its bargaining power as to the price it would pay Mississippi to negotiations between United and Mississippi in proceedings in which it was not a party. We cannot read these drastic terms into an agreement which simply provides for a rate reduction to intervenors in the event its supplier obtains certain benefits.

It therefore follows that in failing to file reductions in the F-1 rate beyond the date upon which United gained its April 1, 1956 increase, Mississippi is attempting to procure a unilateral rate increase without following the procedures of the Natural Gas Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, *supra*; *Tyler Gas Service Co.* v. *Federal Power Commission*, 101 U.S. App. D.C. 184, 247 F.2d 590, *cert. denied*, 355 U.S. 895 (1957). The Commission was correct in deciding that Mississippi was obligated to reduce its F-1 schedule in accordance with the Mississippi-Intervenor settlement for the period November 1, 1955 through October 31, 1958, and to make the necessary refunds.

We cannot agree with Petitioner's contention that the order here under review amounts to a retroactive rate reduction in violation of the rule laid down in *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F.2d 803 (4th Cir. 1952). The order which obligated Mississippi to reduce its F-1 rate was not the order here under review, but rather the June 1953 order pursuant to the Mississippi-Intervenor settlement. As mentioned above, that order merely set a rate subject to downward revision dependent upon the outcome of the United-Mississippi dispute. It is obvious that the precise amount of the reduction, and the refunds necessary under it, could not be ascertained until Dockets G-2019 and G-1142 were concluded. The present order simply supplemented the ordering provisions of the June 1953 order by setting out the precise amount of the refund and the change in the rate. The Commission has

ample power to issue such a supplemental order under Sec. 16 of the Act.[17]

Mississippi also questions the power of the Commission to order the refunds to intervenors at 6% interest. It is true that the Mississi -Intervenor settlement decree did not provide for inter payments on amounts subject to refund. But it is also ...ue that for an appreciable period the intervenors paid higher rates than were warranted, and Mississippi has had the use of the overpayments. The situation is little different from what it would be if the Commission, after a Sec. 4(e) investigation, had determined that rates then in effect were too high and ordered refunds. The Natural Gas Act in that situation clearly allows a refund with interest.[18] We hold the interest payments are allowable.[19]

Mississippi finally contends that the present order was promulgated without a hearing, and is thus invalid. We see no need for an evidentiary hearing in these circumstances. The only question before the Commission was whether Mississippi's proposed refund and rate reduction was in full compliance with the terms of the Mississippi-Intervenor settlement. This was a question of law, dependent upon interpretation of the settlement agreement. Mississippi's interpretation was plainly stated in its letter.

[17] "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." 52 Stat. 830 (1938), 15 U.S.C. § 717(o) (1958).

[18] 52 Stat. 823 (1938), 15 U.S.C. § 717(e) (e) (1958).

[19] *Cf.* United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), citing Baltimore & Ohio RR v. United States, 279 U.S. 781 (1929); Natural Gas Pipeline Co. v. Federal Power Commission, 252 F. 2d 3 (3d Cir.), *cert. denied*, 357 U.S. 927 (1958); Northern Natural Gas Co. v. Federal Power Commission, 215 F. 2d 892 (8th Cir. 1954).

to the Commission, and later in briefs submitted on its petition for rehearing. The intervenors pressed a different viewpoint. The issue was clearly and fully stated and no questions of fact were presented. In essence, all petitioner lost was the privilege of making an oral argument to the Commission. This does not amount to a deprivation of due process, nor violation of the Natural Gas Act. *Sun Oil Co.* v. *Federal Power Commission*, 256 F.2d 233 (5th Cir.), *cert. denied*, 358 U.S. 872 (1958); *cf. Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949).

The order will be

Affirmed.

Filed June 30, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,167 September Term, 1959

MISSISSIPPI RIVER FUEL CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY, MISSOURI SOUTH GAS COMPANY, *Intervenors*.

On Petition to Review an Order of the Federal Power Commission.

Before: PRETTYMAN, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*.

Judgment

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the Federal Power Commission on review in this case is affirmed.

Per Circuit Judge Burger.

Dated: June 30, 1960

Filed September 19, 1960

United States Court of Appeals
for the District of Columbia Circuit

No. 15,167 September Term, 1960

Mississippi River Fuel Corporation, *Petitioner*,

v.

Federal Power Commission, *Respondent*,

Illinois Power Company, *Intervenor*,

Laclede Gas Company, *Intervenor*,

MidSouth Gas Company, *Intervenor*.

Before: Prettyman, *Chief Judge*, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian, and Burger, *Circuit Judges*, in Chambers.

Order

Upon consideration of the petition for rehearing en banc and of the answers thereto, it is

Ordered by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: September 19, 1960

APPENDIX B

The Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part as follows:

Section 4

* * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness

of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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APPENDIX C

A. Partial list of pipeline rate cases terminated during the past ten years by Commission order approving settlement agreements between the pipeline and its utility customers

El Paso Natural Gas Co., 10 F.P.C. 1484
East Tennessee Natural Gas Co., Docket No. G-1925, order issued September 30, 1952
Lake Shore Pipe Line Co., Docket No. G-2118, order issued June 1, 1953
Alabama-Tennessee Natural Gas Co., 12 F.P.C. 161
Tennessee Gas Transmission Co., 12 F.P.C. 1096
Texas Gas Transmission Corp., 12 F.P.C. 295
Tennessee Natural Gas Lines, Inc., Docket No. G-2079, order issued September 18, 1953
Texas Eastern Transmission Corp., 11 F.P.C. 416
Hope Natural Gas Co., 12 F.P.C. 342
United Natural Gas Co., 12 F.P.C. 1446
Transcontinental Gas Pipe Line Corp., 12 F.P.C. 1471
Colorado-Wyoming Gas Co., Docket No. G-2261, order issued January 4, 1954
Northern Natural Gas Co., Docket No. G-2217, order issued January 28, 1954
Atlantic Seaboard Corp., Docket No. G-1806, order issued February 24, 1954
Virginia Gas Transmission Corp., Docket No. G-2054, order issued February 24, 1954
Tennessee Gas Transmission Co., Docket No. G-2252, order issued February 25, 1954
Lake Shore Pipe Line Co., Docket No. G-2254, order issued March 12, 1954
Southern Natural Gas Co., Docket No. 2141, order issued March 17, 1954
Alabama-Tennessee Natural Gas Co., Docket No. G-2253, order issued March 18, 1954
East Tennessee Natural Gas Co., Docket No. 2312, order issued March 24, 1954
Central Kentucky Natural Gas Co., Docket No. G-1791, order issued March 26, 1954
United Fuel Gas Co., Docket No. G-2274, order issued May 13, 1954
New York State Natural Gas Corp., Docket No. G-2119, order issued May 19, 1954
Atlantic Seaboard Corp., Docket No. G-2275, order issued June 23, 1954

Central Kentucky Natural Gas Co., Docket No. G-2276, order issued June 30, 1954
Kentucky-West Virginia Gas Co., Docket No. G-2375, order issued July 29, 1954
Tennessee Gas Transmission Co., Docket No. G-2434, order issued September 10, 1954
Tennessee Natural Gas Lines, Inc., Docket No. G-2438, order issued October 14, 1954
Alabama-Tennessee Natural Gas Co., Docket No. G-2441, order issued October 14, 1954
Lake Shore Pipe Line Co., Docket No. G-2470, order issued October 27, 1954
Transcontinental Gas Pipe Line Corp., Docket No. G-2439, order issued October 27, 1954
East Tennessee Natural Gas Co., Docket No. G-2440, order issued November 3, 1954
Hope Natural Gas Co., Docket No. G-2437, order issued November 17, 1954
Kansas-Nebraska Natural Gas Co., Inc., 14 F.P.C. 495
Colorado-Wyoming Gas Co., Docket No. G-2720, order issued March 14, 1955
Southern Natural Gas Co., 14 F.P.C. 742
Transcontinental Gas Pipe Line Corp., 14 F.P.C. 1075
Cities Service Gas Co., 15 F.P.C. 1448
Northern Natural Gas Co., 16 F.P.C. 803
United Fuel Gas Co., 16 F.P.C. 1069
Manufacturers Light & Heat Co., Docket No. G-2453, order issued November 13, 1956
Atlantic Seaboard Corp., 17 F.P.C. 15
Central Kentucky Natural Gas Co., 17 F.P.C. 396
Colorado-Wyoming Gas Co., 18 F.P.C. 141
Lake Shore Pipe Line Co., Docket No. G-5473, order issued March 7, 1958
Southern Natural Gas Co., 19 F.P.C. 565
Lake Shore Pipe Line Co., 19 F.P.C. 872
Natural Gas Pipeline Co. of America, 19 F.P.C. 1002
Tennessee Natural Gas Lines, Inc., 20 F.P.C. 197
Colorado Interstate Gas Co., 20 F.P.C. 874
Gulf Interstate Gas Co., 19 F.P.C. 1137
Kansas-Colorado Utilities, Inc., 21 F.P.C. 292
Texas Gas Transmission Corp., 21 F.P.C. 535
Natural Gas Pipeline Co. of America, 22 F.P.C. 108
Colorado Interstate Gas Co., 22 F.P.C. 1180
Manufacturers Light and Heat Co., 23 F.P.C. 446

Colorado-Wyoming Gas Co., 23 F.P.C. 569
Nevada Natural Gas Pipe Line Co., 23 F.P.C. 656

B. Typical provisions in settlement orders relating to further rate reductions and refunds upon future contingencies

1. *Colorado-Wyoming Gas Company*, Docket No. G-2261

The Commission orders:

(A) Third Revised Sheet No. 4 superseding Second Revised Sheet No. 3 to Colorado-Wyoming's FPC Gas Tariff, Original Volume No. 1, tendered for filing on December 28, 1953, for the purpose of settling all the issues involved in this proceeding be and the same is hereby accepted for filing to be effective January 1, 1954, upon the following conditions:

(i) If Colorado Interstate Gas Company is required by any final order of the Commission in Docket No. G-2260, which is accepted by Colorado Interstate or becomes final in any court review or otherwise, to refund to Colorado-Wyoming any part of the rates or charges collected under bond by Colorado Interstate from and after January 1, 1954, Colorado-Wyoming shall in turn, make refunds to its customers under Rate Schedule G-1 on the basis of rates reflecting a corresponding reduction in Colorado-Wyoming's demand and commodity charges to such customers.

(ii) If Colorado Interstate Gas Company is required by any final order of the Commission in Docket No. G-2260, which is accepted by Colorado Interstate or becomes final in any court review or otherwise, to make any reduction in the rates or charges to be charged to or collected from Colorado-Wyoming, then Colorado-Wyoming shall file with the Commission changes in Third Revised Sheet No. 4 or in any superseding sheet then in effect to reflect in Colorado-Wyoming's demand and commodity charges in Rate Schedule G-1 the proportionate reduction ordered and made effective by the Commission with respect to Colorado Interstate in Docket No. G-2260.

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2. *Lake Shore Pipe Line Company*, Docket No. G-2254

The Commission finds:

• • •

(2) The public interest requires that, in permitting Fifth Revised Sheets Nos. 4, 5, 6, and 7 to Applicant's FPC Gas Tariff, Original Volume No. 1, to become effective March 1, 1954, the following conditions shall attach:

(i) If, as a result of any orders entered by the Commission *In the Matter of Tennessee Gas Transmission Company*, Docket No. G-2052, and/or *In the Matter of Tennessee Gas Transmission Company*, Docket No. G-2252, Applicant's supplier, Tennessee Gas Transmission Company (TGT), shall file revised rate schedules which are made effective and result in any reduction on or after March 1, 1954, in the rate of $2.60 per each Mcf of billing demand per month and the commodity charge of 21.75¢ per Mcf (at 15.025 psia), Applicant shall file with the Commission changes in its rate schedules to reduce its rates to be identical to the reduction in the demand and/or commodity components reflected in the rates of TGT, and to be effective on the same date as the revised and reduced rates of TGT become effective.

(ii) If, as a result of any Commission orders entered in the aforesaid proceedings in Docket Nos. G-2052 and G-2252, TGT shall make any refunds to Applicant, applicable to sales from and after May 20, 1953, then Applicant shall refund to its utility customers such portions of the TGT refunds as relate to Applicant's sales to its utility customers.

(iii) Any increase in the cost of natural gas purchased by Applicant from its suppliers, TGT, above the rates of $2.60 per each Mcf of billing demand per month and a commodity charge of 21.75¢ per Mcf (at 15.025 psia) which may be proposed by TGT to be effective during the calendar year 1954 for deliveries to Applicant, will be available to Applicant upon the following terms and conditions:

(a) Applicant may file revised tariff sheets with the Commission reflecting an identical increase in the de-

mand component of its then effective rate as that proposed by TGT and/or an identical increase in the commodity component of its then effective rate as proposed by TGT, together with such other revised sheets to Applicant's then effective FPC Gas Tariff as would necessarily change as the result of an increase in the demand and/or commodity charges.

• • •

The Commission orders:

• • •

(B) Applicant's Fifth Revised Sheets Nos. 4, 5, 6, and 7 to its FPC Gas Tariff, Original Volume No. 1, be and the same are hereby allowed to take effect as of 8:00 a.m. on March 1, 1954, upon the terms and conditions described in finding (2) above.

• • •

3. *Texas Gas Transmission Corporation*,

Docket No. G-18886

The Commission orders:

• • •

(B) The offer of settlement filed by Texas Gas on May 23, 1960, as supplemented on September 15, 1960, is hereby approved and made effective subject to the terms and conditions hereinafter ordered.

• • •

(E) Texas Gas shall comply with each of the provisions of the attached Appendix A relating to future refunds and rate reductions.

• • •

(G) Upon compliance with the terms and conditions of this order, the proceeding in Docket No. G-18886 shall be terminated.

• • •

Appendix A relating to future refunds and rate reductions states in pertinent part:

ARTICLE IV

Future Rate Reductions

A. Conditions For, and Time Of, Filings . .

If Texas Gas' supplying-companies, in the pending proceedings enumerated in Article III hereof, or any of them, are required by any final order or orders of the Commission, which are accepted by the respective supplying-company or which become final in any court review, or otherwise, to make any reductions in the rates to be charged or collected for natural gas sold to Texas Gas below those rates which have been used for the purpose of determining Texas Gas' cost of service, which rates are set forth in Schedule I attached hereto, then Texas Gas shall file with the Commission changes in its rates set forth in Article I hereof to reflect said reduction in the manner hereinafter set forth. (footnote omitted) Except as hereinafter provided in paragraph B of this Article IV, each such change in Texas Gas' rates shall be filed within sixty (60) days after the date upon which the order or orders reducing the rates of the supplying-companies become final, to be effective as of the date upon which the respective order or orders are accepted by the supplying-companies or become final in any court review or otherwise, whichever is later, in the aforesaid proceedings referred to in Article III hereof.

• • •

ARTICLE V

Refunds Depending Upon Outcome of Pending Rate Proceedings of Supplying-Companies

If Texas Gas' supplying-companies, in the pending proceedings enumerated in Article III hereof, or any of them, are required by any final order or orders of the Commission, which are accepted by the respective supplying-company or which become final in any court review, or otherwise, to refund to Texas Gas any part of the charges collected under the rates covered in said proceedings, such portion, if any, of such refund attributable to natural gas purchased from said supply-company or companies by Texas Gas on or after November 1, 1959, and resold to utility customers of

Texas Gas under the rate schedules set forth in Article I hereof, shall be refunded to such utility customers. Any such refund by Texas Gas shall be made within sixty (60) days after the receipt of such refund by Texas Gas from said supplying-company or companies, or after such refund order becomes final, whichever is later.

• • •

4. *Tennessee Gas Transmission Company,*
Docket No. G-2252

The Commission orders:

• • •

(C) In the event that the actual Federal income tax payable by Tennessee for the year 1954 is fixed at less than the rate of 52%, Tennessee shall file revised rate schedules which will reflect such decrease, to be equitably apportioned among all rate schedules and Tennessee shall make appropriate refunds from revenues collected under the rates hereby approved after March 1, 1954.

(D) If United Gas Pipe Line Company (United) is required by any final order of the Commission, which is accepted by United or becomes final in any court review or otherwise, in the proceedings in Docket Nos. G-1142 and G-2019 to make any reduction in the rates to be charged or collected for natural gas sold by United to Tennessee, then Tennessee, unless otherwise ordered by the Commission, shall file with the Commission, within 60 days from the date such order becomes final, changes in its Rate Schedules satisfactory to the Commission to reduce the rates therein provided, so as to pass on to its resale customers such rate reductions; and shall refund to its customers any amounts received by it in connection with such proceedings as shall be ordered by the Commission.

(E) The Commission reserves the right to reject all or any part of the revised tariff or tariff sheets to be filed by Tennessee, and in lieu thereof to prescribe by further order appropriate rates, charges, classifications, rules, regulations, and practices, consistent with the settlement agreement.

• • •

5. *Atlantic Seaboard Corporation* and *Virginia Gas Transmission Corporation*, Docket Nos. G-1806 and G-2054

The Commission finds:

• • •

(4) (iii) If Seaboard and Virginia Gas shall receive any refunds on their purchased gas costs by reason of the recent invalidation of the Texas Gathering Tax they shall submit to the Commission for approval a schedule of refunds to be made to their customers, without interest, in proportion to the volumes of natural gas purchased by those customers on a straight volumetric basis during the period from and after February 15, 1953. Further, if the invalidation of such tax results in a reduction of cost to Seaboard and Virginia Gas sufficient to permit its reflection in the rates charged by them, then Seaboard and Virginia Gas shall file a corresponding reduction in the commodity charges of their rate schedules, which shall, as nearly as possible, be equal to the reduction in costs occasioned by the invalidation of such tax.

• • •

The Commission orders:

• • •

(C) Seaboard's FPC Gas Tariff, Fifth Revised Volume No. 1, and Virginia Gas' FPC Gas Tariff, Third Revised Volume No. 1, containing the rates and charges derived by the Staff in Docket No. G-2054, and set out above, adjusted to 1150 Btu per cubic foot heat content, shall be applicable to all sales of natural gas by those companies on and after February 15, 1953; and Seaboard and Virginia Gas, within the time set therein, shall file new rate schedules in conformity with paragraph (2) above, and shall make refunds in conformity with paragraphs (4)(ii) and (iii), above.

• • •

"6. *Northern Natural Gas Company*, Docket No. G-2217

The Commission finds:

. . . .

(2) In the event that the average effective Federal income tax payable by Northern is less than 52 per cent for the year 1954, Northern should forthwith:

(a) File revised schedules covering its Contract Demand (CD-1) and Interruptible Over-Run (R-1) Service, subject to the jurisdiction of the Commission, which revised schedules shall reflect the decrease in Federal income taxes computed by reason of a change in the tax rate of 52 per cent used in this settlement; and

(b) refund to those entitled thereto moneys representing the difference between Federal income tax computed at 52 per cent on revenues received under the rates hereinafter ordered, subject to the jurisdiction of the Commission, and the Federal income tax recomputed on such revenues, for the period commencing December 27, 1953, and ending on the effective date of the revised schedules filed pursuant to subparagraph (a) above. Such decrease attributable to utility customers shall be equitably apportioned between said two rate schedules and said refunds shall be distributed pro rata among the utility customers according to the revenues contributed by them during the period covered by such refunds.

(3) If the so-called Texas gathering tax is held invalid by the final judgment of a court of competent jurisdiction, Northern, upon receipt of any refunds of such tax which have been paid by Northern, or its subsidiaries, Permian and Independent, on gas purchased on and after December 27, 1953, and later sold in interstate commerce to Northern's customers for resale, should distribute the amounts refunded in respect to such gas among said customers, without additional cost or liability to Northern. Such distribution shall be in proportion to the total volume of gas purchased from Northern during the period from and after December 27, 1953. Further, if such tax be invalidated, Northern should, in reference to its sales of natural gas subject to the jurisdiction of the Com-

mission, within ninety (90) days from the date of such invalidation, file a reduction in its Rate Schedules CD-1 and R-1 equal to the saving resulting from such invalidation, subject to such sales, such reduction to be retroactively effective to the date of such invalidation: Provided, however, that in the event that prior to December 27, 1954, the Texas legislature should pass a new Texas Gathering or similar tax, Northern should not be required to make such filing.

(4) In the event subsequent action by this Commission results in refunds to Northern of any portion of monies paid by Northern, or its subsidiaries, to their suppliers of natural gas under the terms of existing contracts, or because of orders of the Corporation Commission of Oklahoma and the State Corporation Commission of Kansas, or other State authority having comparable jurisdiction, such refunds accruing to Northern, or its subsidiaries, relate to volumes purchased for resale to utility customers, should be distributed among Northern's utility customers, without additional cost or liability to Northern. Such distribution to be in proportion to the total volume of gas purchased from Northern during the period from and after December 27, 1953.

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The Commission orders:

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(B) The revised tariff sheets to be filed pursuant to Paragraph (A) above shall be subject to the conditions described in Findings numbered (2) through (4) hereinbefore.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 526

MISSISSIPPI RIVER FUEL CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY, AND MIDSOUTH GAS COMPANY, *Respondents*.

JOINT BRIEF OF RESPONDENTS, ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY AND MIDSOUTH GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 586

MISSISSIPPI RIVER FUEL CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY, AND MIDSOUTH GAS COMPANY, *Respondents*.

JOINT BRIEF OF RESPONDENTS, ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY AND MIDSOUTH GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

We submit that the questions presented are not as stated in the Petition for Certiorari, but are as follows:

1. Whether, in filing and requesting Commission approval of a revised tariff sheet to reflect a reduction in demand and commodity charges required by the Commission's order putting into effect the 1953 settlement of Petitioner's rates, Petitioner was entitled to condition its request for approval on the inclusion of

a provision that such reduction should terminate when (on April 1, 1956) a rate increase by Petitioner's supplier went into effect under bond, although the 1953 settlement contained no such provision; or whether, on the other hand, the Commission was correct in denying Petitioner's request, so conditioned, and requiring Petitioner to file a revised tariff sheet without any time limitation, and to make refunds, with interest, to its customers accordingly.

2. Whether Petitioner's request for inclusion of the time limitation mentioned in Question 1 was not a request for the exercise by the Commission of retroactive rate-making power which the Commission does not have.

3. Whether, in passing on Petitioner's said request, the Commission was required to give Petitioner opportunity to present evidence, or whether, as the Court of Appeals held, the only question before the Commission was a question of law, so that no evidentiary hearing was necessary.

STATEMENT

In 1953, when the Federal Power Commission ordered into effect Mississippi's settlement rates, there were two rate proceedings pending as to Mississippi's supplier, United Gas Pipe Line Company. One of them, G-1142, was an investigation (R. 177-178) under § 5(a) of the Natural Gas Act (Pet. for Cert. p. 18a), in which the Commission could order a rate reduction, but no refund of existing rates found unreasonable. The other, G-2019, was a suspension proceeding (R. 178-179) under § 4(e) (Pet. for Cert. p. 16a), in which a rate filed by United had gone into effect subject to refund.

In the order putting into effect Mississippi's settlement rates to its customers one of the "terms and conditions of this order" was that Mississippi should comply with Paragraphs VI and VII of the proposed settlement (R. 109, Ordering Par. (B)). Paragraph VI (R. 43; 100) referred to the § 4(e) case, G-2019, wherein rates were being collected under bond, and required Mississippi to refund to its customers, according to a precise formula, any refunds received by Mississippi from United in that particular case.* Paragraph VII (R. 44; 101) referred to both cases, the § 5(a) case, G-1142, and the § 4(e) case, G-2019, and provided (see p. 9a of the Petition; also R. 44 or 101) that Mississippi "*shall* file with the Commission changes in its rate schedule F-1 * * *. The said change * * * *to be effective as of the date as of which the reduction in United's rates is made effective.*" (Emphasis by the Court of Appeals)

The Commission decided the two United rate cases, by an order issued November 8, 1955 (14 F.P.C. 406, R. 185-188), prescribing a single rate higher than the one being paid under bond in the § 4(e) case, but lower than the rate under investigation in the § 5(a) case (R. 183-184). This rate was allowed to take effect as of November 8, 1955 (R. 190, Ordering Par. (A)) by the Commission's order of January 6, 1956 (R. 188-191).

The reduction in United's rate thus actually went into effect as of November 8, 1955, and remained in effect until that rate was superseded by a rate filed by United under § 4(d), which, after being suspended, was allowed to take effect, subject to refund, under § 4(e),

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* As pointed out by the Court of Appeals in the footnote on page 8a, Paragraph VI never had any effect.

on April 1, 1956. Subsequent increased rates of United were made effective, subject to refund, on November 16, 1956 (Docket No. G-10592), on December 1, 1957 (Docket No. G-12801), and on December 1, 1958 (Docket No. G-15360). (R. 171)

Mississippi did not file any changed rates until it filed on May 1, 1958 (R. 204) increased rates which went into effect, subject to refund, on November 1, 1958 (R. 168).

Although the necessity of making rate reductions as required by the 1953 settlement order was specifically called to Mississippi's attention by the Commission's letter of March 23, 1956 (R. 220-221) Mississippi did not make the reductions at that time. Instead, by letter of April 12, 1956, Mississippi informed the Commission that it had on March 1, 1956 filed with the Court of Appeals of the District of Columbia a petition to review the order of the Commission in Docket Nos. G-1142 and G-2019 (R. 221-222).

The order of which review was sought, was, as above pointed out, favorable to Mississippi, but Mississippi wanted an order more favorable still. In particular it wanted to continue two rates instead of one (this contention was overruled) but the Court of Appeals did reverse and remand the case on account of failure of United to justify certain costs. *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 252 F. 2d 619 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 904 (1957). When the missing justification was supplied, the Commission on September 11, 1958 (R. 244-255) did not, as stated in page 5 of the Petition for Certiorari, enter its final order "reducing United's rate to Mississippi," but entered its final order putting its final stamp of

approval on United's reduced rate to Mississippi which had already been put into effect as of November 8, 1955 before the review proceeding was begun. This United rate to Mississippi was thus in effect, unstayed by Mississippi's review proceeding, from the time it was allowed by the Commission's order of January 6, 1956 (R. 188-191) to become effective as of November 8, 1955. It remained in effect until April 1, 1956, when it was superseded by the other United rate which went into effect subject to refund.

Following the Commission's September 11, 1958 order mentioned above, Mississippi started the present phase of the proceedings by writing a letter to the Commission dated October 20, 1958 (R. 113-122) which sought the Commission's "approval" (R. 122) of "the retroactive rate reduction to Mississippi's utility customers for the closed-end period January 1, 1956 through March 31, 1956", and included a revised tariff sheet (R. 123-125) to accomplish this purpose.

The Commission (R. 175, Ordering Par. (B)) ordered the proposed revised tariff sheet filed but without any language purporting to limit its effectiveness to the January 1 to March 31, 1956 period and ordered refunds of the difference between the amounts collected and the amounts that would have been collected if the customers had been billed under the revised tariff sheet. (Order of January 23, 1959, R. 164-176). After granting a petition for rehearing (R. 199), the Commission considered the matter further (albeit without setting the case for hearing) and entered a further order (April 2, 1959, R. 200-209) requiring compliance with its January 23, 1959 order.

ARGUMENT

We submit that the Court of Appeals was clearly correct in holding that in the circumstances of this particular case no evidentiary hearing was required because only a question of law was presented. There is no occasion for this Court to review the soundness of the application by the Court of Appeals to the facts of this case of the well settled principles stated in the last paragraph of the opinion (pp. 13a-14a).

Further, Mississippi invited the procedure adopted by its letters to the Commission (R. 113-135; 153-158) and was given full opportunity to urge its contentions.

By the settlement agreement (R. 101-102) and the Commission's 1953 order (R. 109) putting it into effect, the monthly demand charge in Mississippi's Rate Schedule F-1 and the commodity rate therein were required to be reduced effective as of the date as of which the reduction in United's rates was made effective, i.e. November 8, 1955, and Mississippi was required to put its reduced rates into effect by making an appropriate filing.

There is no provision in the settlement agreement, or the 1953 order putting it into effect, that the rate reduction required shall continue for, or only for, any definite or limited period of time. Therefore, the reduced demand and commodity charges of Mississippi must continue from and after the time as of which they were made effective until changed in accordance with the Natural Gas Act.

Nevertheless, in its October 20, 1958 filing, Mississippi, contrary to the terms of the settlement agreement, attempted to limit its rate reduction to the period November 8, 1955 to April 1, 1956. The Commission

correctly refused to rewrite the settlement agreement, and it ordered the reduced rate put into effect without the attempted time limitation.

Mississippi could have filed a new rate, the final decision on which might have freed it from the condition imposed by the 1953 settlement, at any time, but it chose not to do so until May 1, 1958 (R. 204) although three rate increases by United had been put into effect, subject to refund, in the interim (R. 171).

We submit that it is clear that there is no occasion, in the circumstances of this case, for review by this Court.

The Commission's 1953 order, putting into effect the settlement rate subject to a condition requiring reduction of the demand and commodity charges according to a specific formula in case of reduction of United's rates in two specific cases then pending, was clearly appropriate to effective rate regulation in such circumstances, and clearly within the power of the Commission. (Indeed it appears that even now Petitioner is not challenging the Commission's power; Petitioner has argued only the interpretation of the 1953 order and the settlement agreement incorporated therein.) See, in addition to the cases cited by the Court of Appeals (p. 10a), *United Gas Pipe Line Company* v. *Federal Power Commission*, 220 F. 2d 706 (5th Cir. 1955) *cert. denied*, 350 U.S. 844 (1955). We do not have here a case, like those cited on page 11 of the Petition for Certiorari, where private contracts have been held not binding in the face of regulatory action.

In the settlement agreement it was clearly the intention of the parties that Mississippi's rates would be

reduced when United's reduction became effective. Although Mississippi has not challenged this interpretation (to do so would mean that the settlement agreement was an exercise in useless verbiage) it seeks at page 10 of its petition to undermine the effectiveness of the settlement agreement by raising the phantom of automatic rate changes without a rate filing. For several pages (pp. 10-12) the petition demolishes the straw man of automatic rate reduction without a filing, entirely overlooking the point that all parties to the settlement agreement, as well as the Commission which approved it, contemplated a filing by Mississippi as a mechanical means of implementing the Mississippi rate reduction which took effect when United's reduction became effective. When United's reduction became effective, then *automatically* Mississippi became obligated to file lower rates.

The quasi-legislative rate-making power of the Federal Power Commission cannot be exercised retroactively. The 1953 rate order fixed the conditions of that rate—among others requiring reduction of the demand and commodity charges according to a definite formula in certain circumstances, and containing no provision as to the duration of that or any other feature of the 1953 rate. To argue, as Petitioner does, that the Commission could go back now, and change the 1953 rate so as to remove as of April 1, 1956 the condition that was attached to it at its birth, is to argue that the Commission has the very retroactive rate-making power which Petitioner correctly urges that it does not have.

There is nothing in this case or in the decision of the Court of Appeals that calls for review by this Court.

CONCLUSION

We submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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No. 586

In the Supreme Court of the United States

OCTOBER TERM, 1960

MISSISSIPPI RIVER FUEL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY, AND MIDSOUTH GAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a, 14a) is reported at 281 F. 2d 919. The order of the Federal Power Commission issued January 23, 1959 (R. 287–293) is reported at 21 F.P.C. 48.

JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1960 (Pet. App. 14a–15a). A timely petition for rehearing was denied on September 19, 1960 (Pet. App. 15a). The petition for a writ of

certiorari was filed on December 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Did a settlement agreed to by the petitioner natural-gas company and approved by the Federal Power Commission, which required the petitioner to file reductions in the settlement rate upon the occurrence of certain future contingencies, constitute a violation of the notice and filing provisions of Section 4(d) of the Natural Gas Act?

2. Could the petitioner refuse to follow the approved settlement agreement, and in effect raise its rates without having filed an increase as required by Section 4(d) of the Natural Gas Act, on the ground that in its view its customers were receiving a windfall because of its failure to file the appropriate increase?

3. Was the Commission required to grant petitioner an evidentiary hearing on the issue of the legal effect of the settlement agreement and the order approving it?

STATUTE INVOLVED

Pertinent sections of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, are set forth in the Appendix, *infra*, p. 21.

STATEMENT

This is a proceeding to review an order of the Federal Power Commission, initiated by petitioner, Mississippi River Fuel Corporation, a natural-gas com-

pany under Section 2 of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717a(6) (J.A. 267). The order involved was entered in Docket No. G-2153, a proceeding which began April 30, 1952, when Mississippi tendered an increase in its tariff (R. 4). This tender was not accepted by the Commission for filing because the proposed increased rates were partly in anticipation of future increases in Mississippi's costs of gas purchased from United Gas Pipe Line Company (United), under schedules not yet filed (R. 6),[1] 11 F.P.C. 1029. But the order of rejection was set aside by the Court of Appeals for the Third Circuit and the proceeding remanded for hearing as to such portions of the proposed increased rates as Mississippi might be able to justify. *Mississippi River Fuel Corporation* v. *F.P.C.*, 202 F. 2d 899, 902 (R. 7-8, 171-172). In the course of further administrative proceedings, Mississippi and the intervenors[2] entered into settlement negotiations. Out of these came a "Proposed Settlement," concurred in by all interested parties, which was accepted by the Commission in its Opinion No. 253, 12 F.P.C. 151, issued June 3, 1953 (R. 40-64, 209-226). It called for the filing of a settlement rate, Schedule F-1.

In approving the "Proposed Settlement," the Commission adopted a proposed provision that Schedule F-1 should be reduced by a further filing in the event

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[1] United tendered its anticipated rate increase proposal on July 3, 1952; this tender became the subject of Docket No. G-2019 (R. 300).

[2] Three of Mississippi's customers, Illinois Power Company, Laclede Gas Co., and MidSouth Gas Co., intervened in the proceeding under review.

two proceedings on the rates of Mississippi's supplier, United, resulted in reduction in Mississippi's costs (R. 255) (12 F.P.C. at p. 160):

> (F) Mississippi shall, in accordance with Paragraphs VI and VII of the aforesaid "Proposed Settlement" submitted herein on May 22, 1953, unless otherwise ordered by the Commission, make the refunds *and file the changes* in its Rate Schedule E-1, if United Gas Pipe Line Company is required by any final order or orders of the Commission, which are accepted by United or become final in any Court review or otherwise to make any refunds or rate reductions to Mississippi in the proceedings pending in Commission Docket Nos. G-1142 and G-2019, or in either of them. [Emphasis added.]

The pertinent language of Paragraph VII[3] of the "Proposed Settlement," referred to in the above order, is as follows (R. 217):

> If United Gas Pipe Line Company is required by any final order or orders of the Commission, which are accepted by United or become final in any court review or otherwise, in the proceedings in Commission Docket Nos. G-1142 and G-2019, or either of them, to make any reduction in the rates to be charged or collected for natural gas sold by United to Mississippi, then Mississippi, unless otherwise ordered by the Commission, shall file with the Commission changes in its Rate Schedule F-1

[3] Paragraph VI of the "Proposed Settlement" related solely to a possible refund in United's Docket G-2019. It is not involved in this case inasmuch as no refund was ordered by the Commission in that docket.

to reduce the rates therein provided so as to pass on to its utility customers the proper amount (not to be in excess of the amounts provided below) of any such rate reduction ordered and made effective by the Commission in respect of United's rates. The said change in Mississippi's Rate Schedule F-1 is to be filed within 60 days after the date on which the order reducing United's rates becomes final, to be effective as of the date as of which the reduction in United's rates is made effective. * * *

United's rates to Mississippi were subsequently reduced in the two specified proceedings. Docket No. G-1142, was a general investigation of United's rates instituted October 12, 1948, under Section 5(a) of the Act (R. 299). Docket No. G-2019 was a proceeding initiated July 3, 1952, pursuant to Section 4(e) of the Act, whereby United sought to increase its rates for gas sales to its pipeline customers, including Mississippi, and to establish a uniform rate for its sales of natural gas to Mississippi instead of the two rates then being paid by Mississippi under Rate Schedules PL-2 and PL-3 of United's FPC Gas Tariff (R. 300). These two United proceedings, which were consolidated for hearing (R. 299), finally terminated in a Commission order, issued November 8, 1955, directing that United's PL-2 and PL-3 rates be eliminated, and that a new uniform rate be established (R. 416). On January 6, 1956, the Commission accepted United's Rate Schedule PL-C as compliance with its order, effective as of November 8, 1955 (R. 419).

United's new PL–C rate was lower than the old PL–2 and PL–3 rates combined, so that Mississippi, under its 1953 settlement (*supra,* pp. 3–5), was required to pass on a reduction of approximately $1,000,000 annually (*Mississippi River Fuel Corporation* v. *F.P.C.,* 252 F. 2d 619, 624, fn. 7 (C.A.D.C.), certiorari denied, 355 U.S. 904), by reducing its own rate (Mississippi's F–1 schedule) to purchasers like the intervenors and by making appropriate refunds. The Commission reminded Mississippi of this obligation on March 23, 1956 (R. 447), but Mississippi declined to take any action at that time (R. 448). It claimed that the United proceedings referred to in its 1953 settlement were not yet final because Mississippi was seeking court review of the Commission's order in those dockets.

Although on review of the United proceedings the Court of Appeals for the District of Columbia Circuit set aside the November 8, 1955, rate order for further Commission consideration of United's expenditure for gas purchased from its affiliated production company, the court upheld the Commission in all other respects. *Mississippi River Fuel Corp.* v. *F.P.C.,* 252 F. 2d 619 (C.A.D.C.). Moreover, Mississippi subsequently accepted the previously challenged PL–C rate (R. 290) in a settlement which the Commission approved on September 11, 1958 (R. 582–589). 20 F.P.C. 349. The order of approval officially terminated the two proceedings involving United's rates, referred to in Paragraph VII of the 1953 Mississippi rate settlement (*supra,* pp. 4–5), and called Paragraph (F) of the Commission's order approving that settlement (*supra,* p. 4) into immediate operation (R. 588).

United's PL–C rate, which had previously been approved by the Commission (R. 419–420), was made effective as of November 8, 1955.

However, while Mississippi's challenge to United's PL–C rate had been pending, the event occurred which led to the present controversy. United filed an increase in the PL–C rate, which became effective April 1, 1956 (R. 246). This increase, which, if allowed, would wipe out the reductions under the PL–C rate of November 8, 1955, became the subject of a new Commission rate proceeding, Docket No. G–9547 (R. 291). Subsequently, United filed three successive additional increases: November 16, 1956 (Docket No. G–10952); December 1, 1957, (Docket No. G–12801); December 1, 1958 (Docket No. G–15360) (R. 291).[4] But Mississippi made no attempt at that time to increase its own rates under its Schedule F–1, by filing changes in its tariff reflecting the increases filed by its supplier, United (R. 291). It was not until November 1, 1958, that an increase in its Schedule F–1 rates filed by Mississippi (as provided by Sections 4 (d), (e) of the Natural Gas Act) became effective (Docket No. G–15174) (R. 291).

At almost the same time, on October 20, 1958, Mississippi advised the Commission that it intended to "comply" with Paragraph VII of the 1953 settlement agreement and with Paragraph (F) of the Commission's order approving that settlement, *supra,* pp. 4–5, (R. 242), by limiting the rate reduction to the

[4] All of these proceedings were still pending at the time the Commission issued the order under review.

period ending when United's April 1, 1956, increase took effect. It proposed: (1) to refund to its customers a proportionate part of the sums it had received from United, representing the difference between United's Schedules PL–2 and PL–3 and the new United Schedule PL–C, for the period beginning November 8, 1955 (the date from which Schedule PL–C was effective), through December 31, 1955;[4] (2) to revise its Schedule F–1 tariff to reflect reductions in its supplier's (United's) rates for the period from January 1, 1956, through March 31, 1956, *i.e.*, the last day before United's first filed increase in its PL–C rate became effective, *supra*, p. 7; and (3) to make refunds upon the basis of reductions in its Rate Schedule F–1 only through March 31, 1956 (R. 242–247).

By its order of January 23, 1959, the order under review (R. 293), the Commission refused to permit Mississippi to limit its reductions to the period ending March 31, 1956. It held that Mississippi was required, by the terms of its 1953 settlement agreement and by Opinion No. 253 (*supra*, pp. 3–5), to reduce its Schedule F–1 rate to reflect the reductions resulting from the 1958 settlement for the period from November 8, 1955 (the date as of which the United settlement became effective) through October 31, 1958 (when Mississippi's filed increase in its own Schedule F–1 rate became effective, *supra*, p. 7). Refunds were ordered in accordance with the rate changes ordered, with interest at six

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[4] Mississippi had already paid United under the old PL–2 and PL–3 rates until December 31, 1955, when United had begun billing under the PL–C rate. It received a cash refund for this period of $161,137.71.

percent. The refund proposed by petitioner for the period between November 8, 1955, through December 31, 1955, was approved (R. 287–293). On a petition for rehearing, the Commission affirmed its prior ruling (R. 430).

On June 30, 1960, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's January 23, 1959, order (Pet. App. 1a–14a). It held: (1) that the 1953 Mississippi settlement, as approved by the Commission, was restricted to any reductions that might result in the two United rate proceedings specified therein, Dockets Nos. G–1142 and G–2019, and that increases in United's rates to Mississippi involved in subsequent proceedings were not to be taken into account under the settlement; (2) that Mississippi's remedy for increases by its supplier, United, was to file increases in its own tariff in accordance with Sections 4 (d), (e) of the Natural Gas Act; (3) that the Commission's January 23, 1959, order was not a retroactive rate reduction in violation of the rule in *Hope Natural Gas Co.* v. *F.P.C.*, 195 F. 2d 803 (C.A. 4); (4) that the Commission acted within its powers in directing refunds to be made at 6% interest; and (5) that the Commission did not violate the Natural Gas Act or deprive Mississippi of due process when it disposed, without an evidentiary hearing, of the legal questions presented by Mississippi's plan for compliance with Paragraph VII of its 1953 settlement.

ARGUMENT

This case is controlled by (a) the terms of the particular settlement agreement petitioner made with its customers, and (b) petitioner's unexplained fail-

ure to file timely changes in its own tariff, by which it could have avoided the alleged financial disadvantage which prompted this review proceeding. The decision below correctly appraises these factors; the questions properly presented do not involve matters of sufficient public importance to merit review by this Court; and there is no conflict.

1. The record does not present, as petitioner contends, a case in which the Commission has authorized a reduction in a filed tariff without compliance with the notice and filing provisions of Section 4(d) of the Natural Gas Act, App., *infra*, p. 21. The order under review (R. 286) sought to obtain compliance with the Commission's 1953 Mississippi settlement order by directing petitioner to file a substitute tariff reducing its rates to the extent suggested by the petitioner in its proposal of October 20, 1958 (R. 242), but without limiting the reduction to the period ending March 31, 1956. This order implements the provisions of the Commission's Opinion No. 253 of June 3, 1953 (R. 211), which originally approved petitioner's Schedule F–1 subject to the requirement that it be reduced by the filing of appropriate changes, if and when petitioner's supplier, United, reduced the rates involved in Dockets G–1192 and G–2019. Paragraph VII of the 1953 settlement agreement, in which petitioners and the intervenors agreed to Schedule F–1, expressly required that petitioner file reductions in the settlement rate upon the occurrence of the contingency represented by the ultimate outcome of the two United proceedings (R. 217–218). Since, as required by Section 4(d) of the Act, the challenged

order contains a provision "specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published," it accords with the Act.

Petitioner says, however, that the Commission's order was sustained by the Court of Appeals on the theory that Schedule F–1 automatically became reduced when the United proceedings were terminated. But this argument is a quarrel with the court's form of expression, rather than with its decision. For the court did not and could not hold, in the face of the language of the Commission's order requiring that reductions be filed, that the rate was to be reduced without any filing. Instead, the court held that Schedule F–1, as originally promulgated and approved by the Commission, was subject to the requirement that petitioner reduce the rates, by proper filings, upon the happening of specified future contingencies.

The Commission's power to impose such a requirement is well established. See, *e.g., Kerr-McGee Oil Industries, Inc.* v. *F.P.C.*, 260 F. 2d 602 (C.A. 10); *United Gas Pipe Line Co.* v. *F.P.C.*, 220 F. 2d 706 (C.A. 5), certiorari denied, 350 U.S. 844; cf. *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (C.A. 10), certiorari denied, 350 U.S. 1005; *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 253 F. 2d 3 (C.A. 3), certiorari denied, 357 U.S. 927; *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911. It is a necessary attri-

bute of the Commission's duty to pass upon the propriety of rates and charges demanded by natural gas companies. It provides the flexibility by which the complex interrelationships of continually pending litigation between producer, pipeline, and wholesale consumer may be prevented from creating chaos in the gas industry's constantly changing rate structure.

Indeed, petitioner's own proposal to implement the requirements of Paragraph (F) of the Commission's order approving the settlement rate embodied in Schedule F-1, recognized the Commission's power to make future contingencies the condition for the filing of changes in an approved rate. Its letter of October 20, 1958 (R. 242) proposed to reduce Schedule F-1 by filing reductions based on the outcome of the United proceedings and by making refunds from November 8, 1955, through March 31, 1956, the last day before United's first increase in its Schedule PL-C rate became effective. Petitioner's grievance against the order under review is not that it was required to file reductions in Schedule F-1, nor that the reductions were to be retroactive to November 8, 1955, but that they were to be effective beyond the date petitioner's supplier first increased its charges following the required decrease. But, if, as petitioner concedes, the Commission had statutory power to order contingent reductions to be effective prior to March 31, 1956, then it had statutory power to order reductions to be effective subsequent to that date.

Thus, the basic issue tendered by petitioner for review by this Court is simply whether, in the particular circumstances of this case, the Commission

should have departed from the terms of the 1953 Mississippi settlement agreement which it had earlier approved, and should have permitted petitioner to increase its rate without placing the necessary changes in its tariff on file. Even on that issue, which is plainly not for this Court, petitioner's claim has no merit.

2. (*a*). As we have pointed out (*supra*, pp. 3–5), petitioner's Schedule F–1, the 1953 settlement rate approved by and filed with the Commission, was subject to reduction by further changes if and when petitioner's supplier, United, was required to reduce the rates being questioned in Dockets G–1142 and G–2019. The Commission ordered United, in January 1956, to file a reduced rate, Schedule PL–C, effective as of November 8, 1955. If petitioner had, as required by the conditions attending the establishment of its own Schedule F–1, promptly filed the required reduction at that time, its rate, as reduced, would have been the only lawful rate and would have continued in effect until petitioner filed an appropriate increase. By its own decision to litigate the form of United's reduction, however, petitioner postponed until 1958 the performance of its obligation to reduce Schedule F–1.* In the meantime, because it had not reduced its Schedule F–1, it apparently felt that it was under no duty, for its own protection, to file changes in Sched-

* See *Mississippi River Fuel Corp.* v. *F.P.C.*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 355 U.S. 904. Mississippi's protest against the Commission's order reducing United's rate was not primarily aimed at the dollar result, which reduced Mississippi's costs considerably, but at the form of the rate. 252 F. 2d at 624.

ule F-1 compensating for the intervening increases its supplier filed in 1956 and 1957. Thus, while petitioner's customers were on notice that the Schedule F-1 rate was to be reduced in accordance with the outcome of Dockets G-1142 and G-1109 (involving United's rates), they were not informed by any tariff filed by petitioner that the amount or duration of the reduction was to be limited because petitioner's supplier had filed subsequent increases. As far as petitioner's filed tariffs reflected, it did not intend to pass on to its customers United's increases in rates charged petitioner—until November 1, 1958, when petitioner's changes increasing its Schedule F-1 rates became effective. The alleged losses of which petitioner now complains are the same as would have occurred if it had reduced Schedule F-1 in January 1956 and failed to change it until November 1, 1958. Any private financial disadvantage results, therefore, solely from petitioner's own failure to comply with the notice and filing provisions of the Natural Gas Act. This foreseeable consequence of its own mistake does not present a matter of public importance calling for review by this Court.

(*b*). Petitioner suggests that the time lag between the effective date from which United's rate to Mississippi was reduced (November 8, 1955), and the date that petitioner finally accepted the form of that reduction (September 11, 1958), somehow excuses it for not having earlier filed changes in its own rate. As a result of this time lag, the contingency specified by the Commission in Paragraph (F) of Opinion No. 253—*i.e.*, the effective date of reduction in United's

rates—became a past rather than a future event and could, therefore, be practically implemented only by a refund, not by a rate reduction for the future. But the fact that, in the circumstances of this case, there was such a time lag does not absolve petitioner from its obligation to give its customers due notice of changes in its tariff.

Petitioner's Schedule F–1 was subject to change, under the settlement agreement and the Commission's initial order, in accordance with the outcome of Dockets G–1142 and G–2019 only.[1] There was no reservation excusing petitioner from reducing Schedule F–1 because United might or would file subsequent increase in other proceedings. The proper way for petitioner to have protected itself was to file an increase in its Schedule F–1 rate reflecting any subsequent increase filed by United in its PL–C rate. The delay in the disposition of Dockets G–1142 and G–2019 could not obviate petitioner's obligation to file such changes, because the Act does not recognize such an excuse.

3. Petitioner erroneously suggests that the result below conflicts with the decision in *Mississippi River Fuel Corporation* v. *F.P.C.*, 202 F. 2d 899 (C.A. 3). That case held that the Commission erred in summarily refusing to permit the filing of a tariff sub-

[1] The last sentence in Paragraph VII of the settlement agreement (R. 217), which provided that reductions would be limited to the extent of any increases obtained by United, was, as its context indicates, restricted to increases which might be ordered in Dockets G–1142 and G–2019.

mitted by petitioner on April 30, 1952,[8] and directed it to allow petitioner to put the proposed new schedule into effect at once, subject to the refund provisions of Section 4(e) of the Act. The court refused, however, to make the restored change retroactive to April 30, 1952, because to do so would be to treat the Commission's rejection as an approval or as something that had never happened. The court could find "nothing in the statute that sanctions such a course." 202 F. 2d at 904. In reaching this result, the Third Circuit noted that, if the rejected tariff were treated as if it had actually been accepted for filing in accordance with the Act, one of petitioner's customers would have had to pay substantial retroactive charges. From this observation, petitioner concludes that the Third Circuit "implicitly rejected" (Pet. 15) the requirement that a company protect itself from retroactive application of proposed changes involved in pending proceedings by a protective change in its own tariff.[9]

However, the contention said to have been "implicitly rejected" does not appear to have been considered by the Third Circuit. That court was concerned only with its own power under the Act with respect to retroactivity, not with protective rate changes by natural gas companies. In any event, its decision turned

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[8] The increase proposed by petitioner was the subject of the 1953 Mississippi settlement agreement. See the Statement, *supra*, p. 3.

[9] Petitioner obviously does not rely upon the Third Circuit's decision to excuse its obligation to make retroactive reductions, since it proposes to make such reductions for the period between November 8, 1955, and March 31, 1956 (R. 244).

upon the fact that the proposed change had not been accepted as a change in petitioner's tariff, and therefore could not affect its rates. There was no need for petitioner's customers to increase their own rates until petitioner's tariff was changed. In this case, on the other hand, the intervening United increase of April 1, 1956, *supra*, p. 7, very definitely became effective and very definitely affected petitioner's costs. It was incumbent upon petitioner to change its own tariff to reflect this increase, just as it was up to petitioner's customers to make the necessary changes in their tariffs after the tariff amendment involved in the Third Circuit's decision was accepted for filing.

4. Petitioner also argues (Pet. 7–10) that this case has public importance because there have been a number of settlement agreements which establish rates subject to change in accordance with the outcome of other proceedings. It argues that if similar time lags occur, accompanied by intervening increases by suppliers, the necessity for "protective filings" will clutter the dockets of the Commission. But the requirement that changes in tariffs be filed is not within the power of the Commission or a court to waive. It has been established by Congress and must be complied with, whether or not it suits the immediate convenience of the companies required to file tariffs. Such filings are required for the protection of purchasers who may be affected by rate increases. Acceptance of petitioner's contention that an intervening increase by its supplier annuls a pipeline's duty to change its own tariff would mean that pipeline customers who had agreed to a rate subject to future

reductions could find themselves deprived of such reductions without any opportunity to contest the loss. As the court below pointed out (Pet. 11a–12a):

> To accept petitioner's interpretation of the Mississippi-Intervenor settlement would be to assert that [each of] the intervenors agreed (1) to an automatic increase in its rates immediately upon a subsequent United rate increase; (2) to allow the *amount* of that raise to be dictated by agreement between United and Mississippi, and (3) to surrender its bargaining power as to the price it would pay Mississippi to negotiations between United and Mississippi in proceedings in which it was not a party. * * *

5. Finally, this Court is urged by petitioner (Pet. 16–17) to review the contention that an evidentiary hearing should have been held on its proposed plan for compliance with Paragraph (F) of the order approving the settlement agreement. Petitioner wishes the Commission to receive evidence showing that the settlement agreement means more than it discloses on its face, because petitioner had the unilateral understanding that any reduction in Schedule F-1 required by the outcome of Dockets G-1142 and G-2019 would be limited in duration to the date of the first subsequent increase filed by United. Alternatively, petitioner contends that the Commission should have received evidence under the limiting clause in Paragraph (F), *i.e.*, "unless otherwise ordered by the Commission" (R. 100, 101), which petitioner views as empowering the Commission to relieve it from its obligations under the agreement.

Neither of these contentions required an evidentiary hearing. The interpretation of the settlement agreement and the ensuing order did not turn upon petitioner's unilateral understandings, but upon the legal obligation clearly defined in Paragraph VII of the agreement to reduce Schedule F–1. The reservation in Paragraph (F) of power to modify compliance with the terms of the settlement agreement did not confer on the Commission power to excuse petitioner from its obligation to file changes in its tariff reflecting intervening increases by its supplier. The reservation was solely for the purpose of varying the reduction formula set forth in Paragraph VII of the settlement agreement, with respect to the "proper proportion of any * * * over-all reduction of United's rates" (R. 217), *i.e.*, the reductions involved in Dockets G–1142 and G–2019.

Petitioner had ample opportunity to present its view of the settlement agreement, both in its proposal of October 20, 1958, and on rehearing before the Commission. The Commission stayed operation of its order of January 23, 1959, while it reconsidered petitioner's objection to that order (R. 429, 430). After considering the arguments submitted, the Commission affirmed its order of January 23, 1959, in a second opinion (R. 430). Since only legal issues were presented, it was appropriate for the Commission to dispose of the matter on the papers and briefs submitted to it. Certainly, there is no requirement that every legal contention advanced to the Commission be presented in an oral argument because one party so desires. *Sun Oil Co.* v. *Federal Power Commission,*

256 F. 2d 233 (C.A. 5), certiorari denied, 358 U.S. 872; cf. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 282–283.

In short, there is no occasion for this Court to hear petitioner's argument that the particular issues in this case entitled it to an evidentiary hearing or an oral argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

Section 4 of the Natural Gas Act, 52 Stat. 822, 15 U.S.C. 717c provides in pertinent part as follows:

* * * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 586

MISSISSIPPI RIVER FUEL CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, ILLINOIS POWER COMPANY, LACLEDE GAS COMPANY, and MISSOURI GAS COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The Commission in its brief in opposition implicitly concedes that the issues here presented are of general importance in the administration of the Natural Gas Act because settlement agreements with provisions comparable to those here involved are in common use as a means of terminating rate proceedings under the Act.

The gist of its response to the fact that the decision below will cause a rash of "protective" rate filings is that such a procedure has been "established by Congress and must be complied with" (see F.P.C. Br. at pp. 17-18). This attitude merely begs the principal question in this case, namely, whether such "protective" filings *are* necessary. It in no way meets the known fact that, because of Commission's already overloaded docket, the Commission, the various segments

of the gas industry and representatives of the consuming public are searching for every possible means of avoiding unnecessary rate proceedings and of breaking the log-jam of existing cases through settlements or otherwise.

2. The Commission and the other respondents seek to disassociate themselves from the ruling of the court below that there can be an automatic downward revision of rates, i.e., a change in rate without compliance with the notice and filing provisions of the Act. The Commission characterizes the court's ruling as a "form of expression" and says that "the court did not and *could not* hold, in the face of the language of the Commission's order requiring that reductions be filed, that the rate was to be reduced without any filing" (F.P.C. Br., p. 11, emphasis added). The other respondents refer to the matter of automatic rate changes as a "phantom" and a "straw man" (Br., p. 8).

The opinion below, however, is clear that the court was deliberately and advisedly ruling (indeed it italicized the statement) that there can be "*an automatic downward revision*" of rates, and that the Commission "can promulgate a rate subject to an automatic retroactive revision dependent upon a future event" (Pet., App. A, pp. 9a-10a, italics by the court). By now disowning the clear holding of the court below, the respondents necessarily concede that automatic rate changes fall outside the pale of the Natural Gas Act and recognize the binding effect of the numerous decisions so holding (see cases cited in Petition, p. 11).

3. At the same time that if disowns the holding of the court below sanctioning automatic downward re-

vision of rates, the Commission lays great stress upon the "unexplained failure [of Mississippi on April 1, 1956] to file timely changes in its own tariff by which it could have avoided the alleged financial disadvantage which prompted this review proceedings" (F.P.C. Br., pp. 9-10).

These positions are mutually repugnant. It is only by assuming that an *automatic* reduction of Mississippi's settlement rate in fact occurred on November 8, 1955, from the United rate reduction, that the Commission has any basis on which to accuse Mississippi of failing to file a "protective" rate increase on April 1, 1956. Absent the fiction of any automatic downward rate revision, Mississippi's effective rate all the way from 1953 until November 1, 1958, when Mississippi's new rate became effective, was the 1953 settlement rate. The settlement rate was on file with the Commission and was properly charged throughout the entire period in question until Mississippi's higher rate became effective in 1958.[1]

Consequently, there was no necessity on April 1, 1956, for Mississippi to increase its then effective settlement rate in order to avoid any financial disadvantage. Mississippi's financial disadvantage arises only by virtue of the improper holding of the court below that Mississippi's rate on April 1, 1956, was not the settlement rate but an automatically reduced rate.

4. Both the now admitted error of the Court of Appeals in holding that there can be an automatic down-

[1] The amount of the United rate reduction for the short period preceding April 1, 1956, was uncertain until 1958, when, as the court below recognized, the United-Mississippi accord became final (Pet., App. A., p. 5a).

ward revision of rates without a filing and the inconsistent argument which respondents have been forced to advance in an effort to disown the opinion below, stem from their failure to recognize that this is a *refund* case, not a rate case.

The Commission throughout its brief treats the case as if it were a rate case and repeatedly falls into the fundamental error of invoking conventional rate-change procedures and concepts. But this is a refund case. The sole means of carrying out the intention expressed in the settlement agreement to pass on to Mississippi's utility customers only their proper share of the benefits derived by Mississippi from the United case, was by *refunding* such benefits, once their amount was established. The mere fact that Mississippi offered to file a retroactive tariff sheet, which by its terms expired on March 31, 1956, does not change the essential character of the case. This proposal related only to mechanics and was intended merely as a step looking toward Mississippi's refunding to its utility customers the benefits it had received from the United case.

Had the court below treated this case as the refund case it is, Mississippi would not now be in the position of being forced to hand over to its customers a windfall of about $2,000,000 plus several hundred thousand dollars in interest; when the benefits it received under the United rate reduction amounted to only some $300,000.[2]

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[2] Curiously, the Commission also suggests that Mississippi should not have appealed the 1955 Commission order respecting United's rates, saying the appeal was not primarly aimed at the "dollar result" but the "form" of the United rate (F.P.C. Br., pp. 13-14, fn. p. 13), and implying that petitioner thereby caused the problem now presented. Suffice it to say that the settlement specifically

5. Finally, it should be pointed out that the Commission's extended and obstruse attempt to distinguish *Mississippi River Fuel Corporation* v. *F.P.C.*, 202 F. 2d 899 (C.A. 3, 1953), emphasizes the fact that the present case *does* conflict with that of the Third Circuit for the reasons stated in Mississippi's petition (See Pet. at pp. 13-16). Reduced to its simplest terms, that case holds that where, as here, retrospective regulation under the Natural Gas Act is involved, effect must be given to the facts occurring during the retrospective period. This the court below has specifically refused to do here.

For these reasons as well as those set out in our petition, it is respectfully submitted that a writ of certiorari should issue in this case.

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contemplated "court review" of the United case (R. 217), that the "dollar result" was *very much* involved in the appeal, and that Mississippi's success would have inured to the benefit of its customers—primarily the respondent companies.